



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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Matter of: Environmental Affairs Management, Inc.

File: B-277270

Date: September 23, 1997

Kent R. Minshall, Jr., Esq., for the protester.

James J. McCullough, Esq., James S. Kennell, Esq., and Douglas R. M. King, Esq., Fried, Frank, Harris, Shriver & Jacobson, for Science Applications International Corporation, an intervenor.

Richard N. Wolf, Esq., and Laura Henry, Esq., National Aeronautics and Space Administration, for the agency.

Peter Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest alleging that agency officials provided the awardee inside information that gave it a competitive advantage and that evaluators were biased in favor of the awardee is denied where the protester has provided no detail to substantiate its allegations and there is nothing in the record to support them.
2. Protest alleging that agency improperly made an upward adjustment to the protester's proposed costs to reflect the agency's estimate of the amount of a reasonable award fee, without first discussing the matter with the protester is denied where: (1) the RFP was for a cost-plus-award-fee contract and clearly indicated that offers should include an award fee, but the protester's offer did not do so; (2) the agency considered the award fee a key element for ensuring excellent performance; (3) the RFP cautioned that the agency intended to award the contract on the basis of initial proposals without discussions; (4) the protester has indicated that it intended to propose an award fee if the subject had been raised during discussions; and (5) the agency reasonably estimated the protester's award fee based upon the median percentage for award fees contained in other proposals.

3. Award of a contract to the offeror of the higher technically rated, higher-cost proposal was permissible where the agency reasonably determined that the superior technical merit of the awardee's proposal was worth its higher cost.

DECISION

Environmental Affairs Management, Inc. (EAM) protests the National Aeronautics and Space Administration's (NASA) award of a cost-plus-award-fee contract to Science Applications International Corporation (SAIC) pursuant to request for proposals (RFP) No. 3-046562. EAM alleges that SAIC had access to inside information, that NASA's evaluation of EAM's proposal was unreasonable, that NASA incorrectly made an upward adjustment to EAM's price without first having discussed the matter with EAM, and that NASA should have selected EAM on the basis of its lowest-cost, technically acceptable proposal.¹ We deny the protest.

Issued on December 9, 1996, the RFP solicited proposals for providing general and technical support services to the Office of Environmental Programs of NASA Lewis Research Center for a base period of 1 year and included options for 4 additional years. The RFP required that initial proposals be submitted by February 7, 1997, and cautioned that the agency intended to make award on the basis of initial proposals without discussions. The RFP stated that proposals would be evaluated on three factors: mission suitability, relevant experience and past performance, and cost. The RFP indicated that the mission suitability and cost factors were equal in importance and that each was considered more important than the relevant experience and past performance factor. Only the mission suitability factor and its several subfactors were to be given point scores in the technical evaluation. Cost was to be evaluated for realism and to determine the probable cost to the government. The relevant experience and past performance factor was to be adjectivally rated. The RFP stated that proposals would be evaluated to determine which represented the best value to the government and cautioned that the contract might be awarded to an offeror whose proposal was higher priced if that proposal was considered to be sufficiently more advantageous to justify the higher proposed price.

¹The protester also contends that NASA should have given EAM preference in the procurement and awarded it the contract because EAM is a small disadvantaged business. However, the RFP clearly indicated that the procurement was being conducted on the basis of full and open competition. Because the procurement was not set aside for small or small disadvantaged businesses and did not provide for any preference for small or small disadvantaged businesses in the evaluation of proposals, this contention does not provide a valid basis for protest. See Baker Support Servs., Inc.; Management Technical Servs., Inc., B-256192.3, B-256192.4, Sept. 2, 1994, 95-1 CPD ¶ 75 at 3-4; see also MagneTek National Elec. Coil, B-249625, Dec. 4, 1992, 92-2 CPD ¶ 392 at 4.

Seven offers were received and, because one offeror withdrew its proposal, six offers were evaluated and ranked by the source evaluation committee (SEC). SAIC's proposal received the highest technical score with a total of [deleted] (out of 1,000 possible points) for an overall technical rating of "[deleted]" while EAM's proposal received the third-highest technical score with a total of [deleted] points for an overall technical rating of "[deleted]." SAIC's proposed costs plus fee for the potential 5-year life of the contract were approximately \$[deleted] million; this amount was accepted by the agency's price analyst as the most probable cost of having SAIC perform the work.² EAM's proposed costs were roughly \$[deleted] million. However, because EAM's proposal did not include any award fee in its proposed costs,³ the agency made an upward adjustment to EAM's proposed costs of approximately \$[deleted] million, representing [deleted]-percent award fee, and concluded that EAM's most probable cost was approximately \$[deleted] million. No discussions were held. After a briefing by the SEC, the source selection authority (SSA) selected SAIC for contract award because SAIC's significantly higher technical score outweighed its slightly higher probable cost. The contract was awarded to SAIC on May 29. EAM was debriefed on June 2 and filed this protest shortly thereafter.

The protester contends that it was at a competitive disadvantage because SAIC, which was already performing work under a contract with NASA, had access to inside information concerning current and future projects and key personnel within the Office of Environmental Programs, while EAM did not. The protester also contends that NASA personnel may have told SAIC that certain RFP specifications would not have to be met. Moreover, EAM asserts that unnamed evaluators may have been biased in favor of SAIC because they were familiar with SAIC's work for NASA and, therefore, such evaluators should not have been allowed to participate in the evaluation process.

The agency reports that SAIC was not the incumbent contractor providing general and technical support services to the Office of Environmental Programs. Instead, SAIC had a significantly smaller contract to perform architect and engineering services for the Lewis Research Center.⁴ According to NASA, SAIC did not maintain an on-site workforce and did not have access to any proprietary or confidential information under that contract. While SAIC may have gained a general familiarity

²All dollar figures have been rounded off in this decision.

³[deleted]

⁴The agency reports that it ordered approximately \$[deleted] of work in 1997 and \$[deleted] in 1996 under its architect-engineering services contract with SAIC; in contrast, as noted above, the present general and technical services contract is worth approximately \$[deleted] million per year.

with the Lewis Research Center and its programs as a result of its contract, the agency reports that it made a good faith effort to ensure that all competitors understood the present requirements, including, among other things: (1) potential offerors were allowed a site visit; (2) the RFP included references and access to applicable standards and manuals; and (3) offerors' questions were answered in several RFP amendments.

EAM has provided no evidence nor any detailed statement of facts to support its allegations, and there is no evidence in the record indicating either that inside information was given to SAIC or that the evaluators were biased in favor of SAIC. Where, as here, a protester contends that contracting officials provided the awardee inside information and were motivated by bias that caused them to favor one competitor over another, there must be convincing evidence to support the contentions and not mere speculation by the protester. See Group Techs. Corp.; Electrospace Sys., Inc., B-250699 et al., Feb. 17, 1993, 93-1 CPD ¶ 150 at 11; see also Controls Eng'g Maintenance Corp., B-247833.2, Sept. 25, 1992, 92-2 CPD ¶ 204 at 2-3. Since the record here is devoid of such evidence, EAM's allegations are mere speculation and do not provide adequate bases for protest. Bid Protest Regulations, 4 C.F.R. §§ 21.1(c)(4), 21.5(f) (1997); Science Applications Int'l Corp., B-265607, Sept. 1, 1995, 95-2 CPD ¶ 99 at 2-3.

The protester also alleges that the evaluators improperly failed to consider EAM's proposed use of [deleted] as a subcontractor, EAM's "unique and innovative" approaches and concepts, its resources, its proposed key personnel, or its contribution to the agency's environmental mission. The protester does not specify which approaches and concepts in its proposal NASA failed to consider, or the basis for that allegation. Similarly, EAM fails to explain what information in its proposal concerning [deleted] role NASA failed to evaluate.

Our Office will question an agency's evaluation of proposals only if the evaluation lacks a reasonable basis or is inconsistent with the RFP's stated evaluation criteria, DAE Corp., Ltd., B-257185, Sept. 6, 1994, 94-2 CPD ¶ 95 at 4, and our review of the evaluation record here reveals no basis to find that the evaluation was unreasonable or inconsistent with the RFP's criteria.⁵ The agency reports that all aspects of

⁵The contemporaneous evaluation record consisted only of the SEC's consensus report, including technical scores and rankings of the proposals along with brief notes concerning the various strengths and weaknesses of each proposal, and a source selection statement prepared by the SSA explaining why he selected SAIC's proposal for award. NASA reports that the scoresheets and notes prepared by individual evaluators were used by the SEC to arrive at a consensus and to prepare its report for the SSA, but the individual scoresheets were subsequently destroyed. The contemporaneous documents furnished with the report were amplified by
(continued...)

EAM's proposal were evaluated and considered by the SEC, and the record shows that the proposal received an overall "[deleted]" rating. The SEC chairman states that the SEC considered EAM's proposed use of [deleted] as a subcontractor, but the SEC did not share EAM's high regard for [deleted]; the SEC found nothing exceptional (or detrimental) in the proposed use of [deleted] and, therefore, determined it to be not a strength (or a weakness) of EAM's proposal. The SEC chairman also states that there was nothing unique or innovative about EAM's approaches and concepts and that EAM did not identify any apparent contribution to NASA's mission in EAM's proposal. While the SEC recognized that [deleted] was a member of EAM's proposed team, the chairman states that the role of [deleted] was "[deleted]" because EAM's proposal did not explain how its team members would fit into the work effort. Regarding key personnel, the record reflects that the SEC criticized EAM's proposal for failing to provide a [deleted]. Moreover, the SEC determined that EAM's proposed [deleted] qualifications were acceptable but unremarkable and, therefore, [deleted] was considered neither a strength nor a weakness of the proposal. Because EAM's protest made only a very general allegation that the evaluation did not consider these aspects of its proposal, without any detailed statement in support of the allegation, it appears that EAM merely disagrees with the agency's evaluation. However, EAM's mere disagreement with the agency over its technical evaluation does not establish that the evaluation was unreasonable. Id.

The protester also contends that its total proposed costs, which did not include any award fee, were about [deleted] percent less⁶ than SAIC's proposed costs plus fee, but NASA improperly added [deleted]-percent award fee, or approximately \$[deleted] million, to EAM's proposed costs, significantly reducing EAM's cost advantage. EAM states that, if NASA had discussed the fact that EAM's proposal did not include an amount representing the potential award fee, "EAM's plan . . . was to add no greater than [deleted]% to our overall cost." Thus, EAM asserts that, because NASA did not hold discussions with EAM on this matter, NASA overestimated the award fee that EAM planned to add to its original proposed costs.

⁵(...continued)

NASA in a legal brief, a contracting officer's statement, and declarations made by the SSA and the chairman of the SEC, all of which were prepared by NASA after EAM filed its protest. We properly examined both the contemporaneous record and the post-protest amplifications. See Southwest Marine, Inc.; American Sys. Eng'g Corp., B-265865.3, B-265865.4, Jan. 23, 1996, 96-1 CPD ¶ 56 at 10-11.

⁶EAM's total proposed costs were actually approximately [deleted] percent less than SAIC's total proposed costs-plus-award-fee.

Where a cost reimbursement contract is to be awarded, the offerors' estimated costs of contract performance should not be considered as controlling since the estimates may not provide valid indications of the final actual costs which the government is required to pay. MKA, B-257431.3, Oct. 4, 1994, 94-2 CPD ¶ 152 at 6. The agency's evaluation of estimated costs should determine the extent to which offerors' estimates represent what the contract should cost, assuming reasonable economy and efficiency. Id. Our review is limited to considering whether the agency's cost realism determination was reasonable. Id.

It should have been clear to EAM from a reading of the RFP both that its proposal was expected to include an award fee in the breakdown of its proposed costs and that NASA did not intend to hold discussions with any of the offerors. The RFP stated that NASA was changing the type of contract for this work from the previous cost-plus-fixed-fee contract to a cost-plus-award-fee contract in order to allow NASA to "incentivize the results of the effort." In this regard, the Federal Acquisition Regulation (FAR) explains that a cost-plus-award-fee contract includes an award amount that the contractor may earn in whole or in part, depending upon the government's assessment of the contractor's performance, and that is sufficient to provide motivation for excellent performance. FAR §§ 16.305 and 16.405-2(a). The RFP's proposal preparation instructions, which listed the basic cost elements that were to be included in the cost proposals for each year of the contract, specifically stated that a fee was to be included.

When EAM submitted an initial proposal that did not include any amount for the award fee, NASA determined that a key cost element had been omitted. NASA considered the award fee to be a key element because it was the methodology chosen by NASA to induce excellent performance. Rather than opening discussions with EAM and all other offerors, the agency's cost analyst and the contracting officer decided to add [deleted]-percent fee to EAM's total costs. The [deleted]-percent figure represented the median percentage of the fees that were proposed by the other offerors. We note that by using the median percentage rate to calculate EAM's probable award fee of approximately \$[deleted] million, NASA still credited EAM with the smallest award fee, in actual dollar terms, of any offer. In view of the RFP's express warning that the contract would be awarded without discussions, because of the RFP's indication that an award fee was anticipated, and because the agency viewed the award fee as essential to encourage excellent performance, we see nothing wrong with NASA's making the cost adjustment without discussions.

Finally, EAM contends that NASA should have selected EAM on the basis of its lowest-cost, technically acceptable proposal. In the context of this procurement, this contention fails to state a valid basis of protest. In a negotiated procurement, a procuring agency has the discretion to select a more highly rated technical proposal if doing so is reasonable and consistent with the RFP's evaluation scheme. Pacific Architects & Eng'rs. Inc., B-257431.7, Dec. 8, 1994, 95-1 CPD ¶ 202 at 11. Because the RFP here did not require the selection of the lowest-cost, technically acceptable

proposal, we dismiss EAM's allegation on this point for failure to state a valid basis of protest. See Bid Protest Regulations, 4 C.F.R. § 21.5(f).

In any event, we note that the protester has furnished no detailed explanation to support its position that its proposal was evaluated unreasonably, and our review of the record confirms that NASA reasonably found SAIC's proposal technically superior under the mission suitability and relevant experience/past performance factors. Accordingly, the SSA's decision to award the contract to SAIC on the basis of its proposal's superior technical ratings in spite of EAM's lower probable cost was reasonable.

The protest is denied.

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